



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 22, 2003

Mr. Brad Norton
Assistant City Attorney
City of Austin - Law Department
P. O. Box 1088
Austin, Texas 78767-8845

OR2003-5923

Dear Mr. Norton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 186381.

The City of Austin (the "city") received a request for "the certified payroll reports for Crane Electric and/or ADB Construction for the ongoing project at the Airport Parking Administration Building." You claim that the requested information is not public information subject to disclosure under chapter 552. of the Government Code. We have considered your arguments and have reviewed the submitted information. We have also considered written comments submitted on behalf of the requestor. *See* Gov't Code § 552.304 (providing that member of public may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

Chapter 552 of the Government Code is applicable only to "public information." *See* Gov't Code § 552.021. Section 552.002 of the Government Code defines "public information" as

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.002(a). Thus, the requested information is subject to chapter 552 of the Government Code only if (1) the information is "collected, assembled, or maintained" by the city or (2) the information is collected, assembled or maintained "for [the city] and the [city] owns the information or has a right of access to it."

In this instance, the requestor seeks access to payroll reports concerning Crane Electric and/or ADB Construction. Chapter 2258 of the Government Code is applicable to prevailing wage rates for public works projects. Section 2258.021(a) provides that workers, laborers, or mechanics employed by or on behalf of the state or a political subdivision of the state shall be paid "[n]ot less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the work is performed[.]" Section 2258.024 requires the contractor and each subcontractor to keep a record of the name and occupation of each worker and the actual per diem wages paid to each worker employed on the project. *See id.* § 2258.024(a). Section 2258.024 also provides that this record "shall be open at all reasonable hours to inspection by the officers and agents of the public body." *Id.* § 2258.024(b); *see also id.* § 2258.058 (criminal penalty for violation of Gov't Code § 2258.024).

The submitted information consists of the payroll records of Crane Electric, a third-party contractor on a city construction project. You state that the city does not maintain the requested payroll records. Likewise, you represent that the contractor does not prepare the requested payroll records as the agent of the city, and instead, that the contractor does so in the performance of its own statutory duties under section 2258.024 of the Government Code. However, the attorney for the requestor (the "attorney") contends that the contractor is also acting on behalf of the city as its agent in collecting, assembling, and maintaining the requested information. In support, the attorney notes that the contract between the city and Crane Electric contains provisions which mandate that the contractor maintain certain payroll information and that such records shall be open to inspection by the city. The attorney asserts that these contract provisions "enlarge the contractor's duty to the City beyond the contractor's statutory duties." The attorney further argues that "[t]his contract provision requires affirmative action on the part of the contractor at the behest of the City which clearly shows that the contractor is 'collecting, assembling, and maintaining' the records for the city." [Emphasis in original]. The city contends that "[t]he contract between the City and the contractor contains a provision that restates the requirements of Section 2258.024. The contract provision specifies some timelines for production and retention of the information, but does not add any additional requirements as to the actual information the contractor must keep."

After carefully considering the arguments of the attorney and the city, we conclude that Crane Electric does not prepare the requested payroll records as the agent of the city. Rather, Crane electric does so in the performance of its own statutory duties under section 2258.024 of the Government Code. *Compare* Open Records Decision No. 558 (1990) (information is subject to chapter 552 of Government Code, even though it is not in governmental body's

physical custody, where third party prepared information on governmental body's behalf and makes it available to governmental body). Therefore, we conclude that the requested payroll records are not information collected, assembled, or maintained by the city or for the city for purposes of section 552.002(a)(1) or (a)(2). Consequently, the requested payroll records do not constitute public information under section 552.002 of the Government Code, and thus, the city is not required to make the records available to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

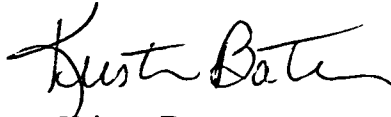
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts.

Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kristen Bates
Assistant Attorney General
Open Records Division

KAB/lmt

Ref: ID# 186381

Enc. Submitted documents

c: Mr. Michael Murphy
IBEW Local Union 520
4818 E. Ben White Blvd., #300
Austin, Texas 78741
(w/o enclosures)

Ms. Heidi L. Widell
David Van Os & Associates, P.C.
1606 N. Alamo St.
San Antonio, Texas 78215
(w/o enclosures)